

**Grand Mela Corp., d/b/a Paper Moon Milano and
Raffaele Federico.** Case 2-CA-25616

August 31, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN,
AND TRUESDALE

On November 23, 1993, the National Labor Relations Board issued a Decision and Order in this proceeding in which it ordered the Respondent to make Raffaele Federico whole for any loss of earnings he suffered by reason of the Respondent's discrimination against him.¹ A controversy having arisen over the amount of backpay due to Federico under the Board's Order, the Regional Director for Region 2 issued a compliance specification and notice of hearing on April 29, 1994, alleging the amounts of backpay due. Pursuant to notice, a hearing was held before Administrative Law Judge Joel P. Biblowitz on January 17 and March 24, 1995.

On May 31, 1995, the administrative law judge issued his Supplemental Decision and Order. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached supplemental decision in light of the exception and brief and, has decided to affirm the judge's rulings, findings,² and conclusions.

ORDER

The National Labor Relations Board orders that the Respondent, Grand Mela Corp., d/b/a Paper Moon Milano, New York, New York, its officers, agents, successors, and assigns, shall make whole the following claimant by paying him the amount opposite his name, plus interest to the date of payment, less withholdings required by Federal and state laws.

Raffaele Federico	\$45,346
-------------------	----------

¹ 313 NLRB 64 (1993).

² We find no merit in the Respondent's contention that the judge erred by failing to consider Federico's cash tips in calculating his interim earnings. We note that the Respondent has failed to meet its burden of showing that the judge did not consider cash tips in his analysis of Federico's interim earnings. Furthermore, the Respondent's calculations of cash tips Federico may have earned during his interim employment are speculative.

Burt Pearlstone, Esq., for the General Counsel.
Robert V. Ferrari, Esq., for the Respondent.
Deborah Singer, Esq., for H.E.R.E., Local 100.

SUPPLEMENTAL DECISION

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on January 17 and March 24, 1995. The compliance specification issued on April 29, 1994, and alleges that Raffaele Federico, the discriminatee, is owed an amount of \$54,317.63, plus interest, from Grand Mela Corp., d/b/a Paper Moon Milano (Respondent). In the underlying case, at 313 NLRB 64 (1994), the Board found, *inter alia*, that Respondent discharged Federico on January 20, 1992,¹ reinstated him on January 27, and discharged him again on March 5, in violation of Section 8(a)(1) and (3) of the Act.

THE FACTS

I. THE BACKPAY PERIOD

The compliance specification alleges, and Respondent admits, that the backpay periods are from January 20 through 27, and from March 5 through December 28, 1993.

II. MEASURE OF BACKPAY

This allegation is also admitted:

During the backpay period set forth in paragraph I above, Federico's gross backpay would have been his total gross earnings based upon an average of the earnings and tips of similarly situated employees, with a base rate of \$2.75 an hour for forty hours, time and a half for overtime, and the average tips earned by waiters who worked a minimum of six (6) shifts per week. The average was calculated from the Respondent's payroll and tips records of the week on which the fifteenth of each month fell, unless such records were not available, in which case the average was calculated from the average of the same week of the month, or the previous month of the previous year, and/or the following year, depending on what records were made available.

III. NET INTERIM EARNINGS

This was the disputed allegation. Respondent had two defenses herein: that Federico did not make a good-faith search for interim employment and improperly left some of these positions, and that he understated the amount of the tips that he received during his interim employment and is therefore entitled to no backpay, or less backpay, during certain periods.

A. The Search for Interim Employment

Federico was terminated by Respondent for the second time on March 5, the beginning of the major part of the backpay period, and he found another job about 3 or 4 weeks later at Orsinini. During this period he searched for work in the following manner:

Well, my system was walking from one avenue to another and from one street to another, walking inside restaurants and simply asking if they needed . . . new waiters, or some applications to fill out . . .

¹ Unless indicated otherwise, all dates referred to relate to the year 1992.

He visited French and Italian restaurants in about the areas of 50th Street to 52nd Street in Manhattan and filled out employment applications at these restaurants. He named 10 restaurants, including Orsinini, that he visited in looking for work, and testified that there were others whose names he could not remember. He began working at Orsinini's in about the beginning of April and worked there for about 2 months, earning about \$500 to \$600 a week. While employed at Orsinini, he felt that he was not earning enough money and began looking elsewhere. On about June 3, he left work there and, a few days later, he began working at San Pietro, another Italian Restaurant, where his weekly gross pay ranged from \$600 to \$750. He remained at San Pietro until about the middle of October, when he left its employ due to disagreements with the owner,² one of which was that the owner wanted to replace him with another employee as captain at the facility. In addition, about a month before he left his employ at San Pietro, he told the owner that he had to better understand his employees' needs; that the employees were working 12 hours a day, without a break, and that they would perform better if they had some breaks and if he didn't curse them and call them names. The owner told him, "You give me concern because you behave like a union leader." This convinced Federico that the owner knew of his union involvement while employed by Respondent.

After leaving San Pietro, he found another job about 2 weeks later, in about late October, at Oggi Domani, an Italian Restaurant in Greenwich Village, New York. During that 2-week period, he walked into restaurants between about 3 and 5 p.m., which he found was the best time to inquire about jobs. He named 13 restaurants that he visited before he found the job at Oggi Domani, through an ad in the New York Times. The restaurant was preparing for its grand opening, and the first 10 days of employment there was unpaid, as the staff met to prepare the menu. This restaurant did poorly and he remained there until about the beginning of June 1993, earning about \$160 to \$200 a week; about a week after he left his employ there, the restaurant went out of business.

At about the end of June 1993, about 2 or 3 weeks after leaving Oggi Domani, Federico began working at Primola Restaurant. During that 2- to 3-week period he visited restaurants in Greenwich Village, as well as uptown restaurants, and he named about 15 restaurants that he visited during this period. While employed at Primola he earned between \$550 to \$700 a week. He testified that on about October 16, 1993, he was laid off by Primola due to disagreements with the owner, Djuliano Zuliana. He testified that about a week before he left his employ there, he was at the bar obtaining a glass of wine for a customer when Zuliana pushed him aside, causing the glass of wine to fall to the floor. Federico told Zuliana not to harass his employees on the job and Zuliani told him that he had to understand that he gets very nervous when the restaurant is busy. Federico responded that he should not be that way, that he should leave his employees alone, and give them more respect. Zuliana, an obviously

credible witness, testified that his problem with Federico was that they did not get along; one reason for this was that Federico was unwilling to "close his eyes" to certain things. About a month prior to the end of Federico's employment at Primola, Zuliana called him over and said: "We have to talk, we have to get along, otherwise we can't work together. Sometimes you have to close your eyes and turn around and everything is going to be all right at the end of the night." He testified that Federico was not fired: "It was like a mutual . . . thing that he left."

His next job was at Sistina Restaurant, where he began working in about the beginning of December 1993. During the 6-week period between leaving Primola and beginning work at Sistina, he followed the same procedure he had in the past of walking around and asking if work was available, and he named 17 restaurants that he remembered visiting during that period before obtaining work at Sistina. He remained at Sistina through the end of the backpay period.

In backpay proceedings respondents have the burden of establishing affirmative defenses that would mitigate their liability. *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). This includes the burden of establishing such matters as unavailability of jobs, willful loss of earnings and interim earnings to be deducted from backpay. *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812-813 (5th Cir. 1966). When there are uncertainties or ambiguities, doubt should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068.

In the underlying case, it was found that Federico was unlawfully terminated on January 20. On the following day, he was called by Respondent's assistant manager and told to report for work on January 27. As Federico was told on the day after his discharge to report for work 6 days later, he had no obligation to search for interim employment for this 6-day period. The issue is whether his search for interim employment from March 5 through December 1993 satisfies the Board's requirements. I find that it does. During the backpay period herein, the amount of time that Federico spent between jobs ranged from a few days (between Orsinini and San Pietro) to about 6 weeks (between Primola and Sistina). In *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955), the court stated: "the principle of mitigation of damages does not require success; it only requires an honest good faith effort" The evidence establishes that Federico made an honest good-faith effort to find interim employment. He walked around visiting restaurants and looked in the newspaper for possible jobs. The fact that he usually found a new job within about 2 to 3 weeks indicates that he made a good-faith effort to locate interim employment, and I so find.

Federico worked at five different restaurants during the backpay period—22 months. He left Orsinini to go to San Pietro, a few days later, in order to earn more money, certainly a valid reason. He left San Pietro because he felt that the owner's statement indicated that he was aware of Federico's prior union difficulties and that the owner wanted to replace him as captain, which would apparently affect his earnings. A discriminatee who leaves his job for a justifiable reason does not forfeit his right to further backpay, *NLRB v. Ryder System, Inc.*, 983 F.2d 705, 714 (6th Cir. 1993), and there was no evidence to contradict Federico's testimony, as rambling and unending as it was, that he was justified in

²Federico was not a witness that one could describe as direct or brief. Rather, practically every answer was longer than it should have been and many included lengthy explanations that he had not been asked for.

leaving his employment at San Pietro. Federico was clearly justified in leaving Oggi Domani, which was about to close, where his earnings were about 25 percent of prior earnings. On about October 16, 1993, Federico ended his employ at Primola. Whether I credit Federico that he was laid off, or Zuliana, that it was a "mutual thing," he clearly was not discharged for gross or willful misconduct, *NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 512 (7th Cir. 1991), which would have tolled his backpay. Zuliana's testimony supports Federico's testimony that he had a valid reason for leaving Primola, that they could not get along. I therefore find that Federico's backpay was not tolled at any time during the backpay period for either the lack of a good-faith search for work, or for improperly leaving any of his interim jobs.

B. Interim Earnings

The principal issue litigated herein was whether Federico honestly reported his interim earnings. The compliance specification lists Federico's interim earnings at Orsinini as \$4936 for the second quarter of 1992. He testified that he worked there for about 2 months and earned between \$500 and \$600 a week. The parties stipulated that his W-2 from Orsinini states that he had tips of \$4070 and wages of \$2565 while employed there. The procedure at Orsinini, and the other restaurants that he worked at as well, was for the waiters to "pool" their tips. Although there were variations in how this worked at the different restaurants, at the end of the evening the owner, maitre d', or some other individual, calculated the amount of tips charged by customers on that evening. On the following day, the employer gave the waiters cash in the amount of the prior day's charged tips for distribution. Each waiter received an equal share, while the busboys each received half shares, and the bartender usually received a percentage share.

The compliance specification lists interim earnings for Federico at San Pietro for the second, third, and fourth quarter of 1992 as \$4915, \$7932, and \$337. Federico testified that he began working there on about June 5 or 6, and his pay ranged from \$600 to \$750 a week. The parties stipulated that his W-2 from San Pietro states that he earned tips of \$10,619 and wages of \$2565. San Pietro, Primola, and Sistina were the only restaurants involved in this proceeding, other than Respondent, that maintained records of the actual tips received by the waiters. Graziella Baldin, who has been the bookkeeper at San Pietro since July, testified that during the period in question the restaurant's procedure was to declare as income for its waiters 10 percent of the restaurant's gross income. Therefore, if the restaurant's gross business on 1 day was \$5000, about \$500 (10 percent of the gross) would be divided among the staff. If there were four waiters and two busboys (who each get half shares) that day, an amount of \$100 would be declared toward each waiter's W-2 for that day. She also maintained records stating the total amount of the charged tips per day, however, divided by the number of employees who pooled these tips, showing the actual charged tips allegedly received by each of the employees. The procedure that she followed was, each morning, to prepare a check in the amount of the charged tips, and that check was cashed and the cash was given to the waiters for distribution. These records also state the amount of the "Declared tips," which as previously stated was each waiter's pooled share of 10 percent of the evening's gross income.

According to these records, during Federico's 19 weeks of employment at San Pietro, his "effective tips" (meaning what Baldin assumed was his share of the pooled tips) were \$15,389.70 and his declared tips (his share of 10 percent of Respondent's gross on the days that he was employed) were \$10,619, the amount she placed on his W-2 form.

The compliance specification lists his interim earnings at Oggi Domani as \$1050 in the fourth quarter of 1992, \$2026 in the first quarter of 1993, and \$1690 in the second quarter of 1993. Federico testified that he earned between \$160 to \$200 a week while employed there. The parties stipulated the his W-2 for Oggi Domani states that he earned \$1543 in wages and \$2174 in tips in 1993.

His next employer was Primola where, according to the compliance specification, he had interim earnings of \$6820 in the third quarter of 1993, and \$1186 in the fourth quarter of 1993. He testified that his earnings at Primola ranged from \$550 to \$700 a week, and the parties stipulated that his W-2 for Primola states that he had received wages of \$1409 and tips of \$6480 in 1993.³ Primola's procedure of distributing the tips to the waiters and busboys was different from the other restaurant's that Federico worked at during this period in that the employer distributed the tips to the waiters and the employees signed for the amounts that they received. These books state that Federico received \$8910 in tips during his employment at Primola. Federico testified that the only documents that he had in his possession when he supplied the Regional Office with his earning records for the backpay period (for all the restaurants involved herein) were the W-2 forms from his interim employers.

The compliance specification lists Federico's interim earnings at Sistina as \$1280. He testified that he began working there in early December 1993 and remained there through the end of the backpay period, December 28, 1993. The parties stipulated that his W-2 from Sistina states that he earned wages of \$180 and tips of \$1100. Liliana Rottura, who is the bookkeeper for Sistina Restaurant, testified that Federico began working there during the week ending December 11, 1993, and worked through December 28, 1993. During that period, Sistina's policy was to declare as income for each waiter his share of an amount equal to 10 percent of the restaurant's gross business. In addition, she kept records of the total amount of charged tips per day. In his 4 weeks of employment at Sistina during that period, he worked 4 days, 6 days, 1 day, and 1 day. Rottura's records establish that for these days the total charged tips received by the waiters was \$11,813. Her procedure was to write a check each morning in the amount of the charged tips of the prior day, cash the check, and give it to her husband who works at the restaurant, and he gives it to the waiters to distribute pursuant to their pool arrangement. She does not participate in the distribution of the money and has no record of the actual amount that Federico received during his employment at Sistina. She credited Federico (on his W-2 form), however, with \$1100 of the \$7360 "declared" on the days that he worked. Assuming the same percentage was used for actual tips would mean that he received \$1772 in tips while employed at Sistina.

In *American Navigation Co.*, 268 NLRB 426, the Board determined that discriminatees would be denied backpay for

³ There is no explanation for the discrepancy of \$117.

all quarters in which it is found that they intentionally concealed employment or earnings from the Board. The Board stated (Id. at 428): "This remedy will be applied, of course, only in cases where the claimant is found to have willfully deceived the Board, and not where the claimant, through inadvertence, fails to report earnings." In a footnote to this statement, the Board stated that it is confident that the administrative law judges were capable of distinguishing honest error from deceit.

The compliance specification lists Federico's interim earnings at Orsinini as \$4936; the parties stipulated that his W-2 from Orsinini states that he earned \$4070 in tips and \$2565 in wages, for a total of \$6635. There is no explanation for this discrepancy, nor is there any evidence that it was the result of a willful deception by Federico. I find that he is entitled to backpay for the period, but that his interim earnings at Orsinini, for the second quarter of 1992, should be computed as \$6635. The amounts specified in the compliance specification for his employment at Oggi Domani in the fourth quarter of 1992 and the first and second quarters of 1993 are supported by his testimony and the W-2 form from this restaurant, and there is no evidence to contradict this. I therefore find that these reported amounts represent his interim earnings at Oggi Domani during the fourth quarter of 1992 and the first and second quarters of 1993.

The situation is different at San Pietro, Primola, and Sistina, where records were maintained of actual, or presumed, tips received by the waiters. The testimony establishes that at San Pietro and Sistina, the procedure at the time was to declare for each waiter his share (depending on the pool arrangements) of 10 percent of the restaurant's gross business for the day. That was the amount that was placed on his W-2 form. Although the amounts listed in the compliance specification, \$4915, \$7932, and \$337, for the second, third, and fourth quarter of 1992 correspond with the W-2 form that he received from San Pietro, it does not correspond with the restaurant's records of what he actually earned. The same is true for Primola and Sistina; the amounts set forth in the compliance specification conform with the W-2 forms that he received from these restaurants, but not with their records of what he actually, or presumably, earned in tips.⁴ The issue is whether this was an excusable error or whether it was a willful deception resulting in the denial of backpay during the periods in question.

The employment discussed occurred from 15 months to 3 years prior to the hearing herein, and from 4 months to 2 years prior to the issuance of the compliance specification herein. There is no evidence that Federico had anything in his possession from either San Pietro, Primola, or Sistina other than the W-2 forms. Although the evidence establishes

that, while employed at Primola, Federico signed for the fact that he received \$8910 in tips, while he only reported \$6480 in tips, there is no evidence that he was ever given a record of the actual amount of tips that he earned there; rather, all that he received from the restaurants were the W-2 forms upon which he based his information that he supplied to the Board. As there is no evidence of a deliberate attempt to deceive the Board, I find that while the true amount of his tips received during this period will constitute interim earnings, he will not be deprived of backpay during any of these quarters. *Colorado Forge Corp.*, 285 NLRB 530, 543 (1987); *Brown Co.*, 305 NLRB 62, 67 (1991).

In summary, as Federico's W-2 from Orsinini states that he earned \$6635, that amount shall be his interim earnings at Orsinini for the second quarter of 1992. Further, based upon the credited testimony of Baldin, I find that Federico's interim earnings at San Pietro are as follows: for the second quarter of 1992, \$5748 in tips and \$949 in wages; for the third quarter, \$9264 in tips and \$1539 in wages; and in the fourth quarter, \$377 in tips and \$77 in wages. There is no dispute about his interim earnings at Oggi Domani for the fourth quarter of 1992 or the first and second quarter of 1993. I find that his interim earnings at Primola were \$8773 for the third quarter of 1993 and \$1546 for the fourth quarter of 1993.⁵ And finally, I find that his interim earnings at Sistina were \$1772 in tips and \$180 in wages, for a total of \$1952 for the fourth quarter of 1993.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Grand Mela Corp., d/b/a Paper Moon Milano, New York, New York, its officers, agents, successors, and assigns, shall pay to Raffaele Federico the sum of \$45,346, plus interest, calculated as follows:

<i>Backpay Period</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Net Backpay</i>
1st Q 1992	\$3,847.92	None	\$3,848
2d Q 1992	13,515.90	\$13,332	184
3d Q 1992	11,264.50	10,803	462
4th Q 1992	12,766.80	1,504	11,263
1st Q 1993	9,749.29	2,026	7,723
2d Q 1993	12,012.20	1,690	10,322
3d Q 1993	9,767.71	8,773	995
4th Q 1993	14,046.70	3,498	10,549

⁴During the hearing, counsel for General Counsel cross-examined Baldin and Rottura about the fact that they did not actually distribute the money to the waiters, apparently to establish that these records were not trustworthy. In addition, however, to the fact that Baldin and Rottura were disinterested and credible witnesses, a comparison of the reported amount (10 percent of the gross business) with the actual amounts, indicates that it would be approximately the usual 15-percent tip amount. I therefore credit the testimony of Rottura and Baldin and find the figures they supplied to be accurate.

⁵In his brief, counsel for the General Counsel moved to amend the compliance specification to allege that his total interim earnings at Primola were \$10,436. I find, however, that these interim earnings were \$10,319, tips of \$8910, and wages of \$1409.

⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.